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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

1607

HARRY R. SMITH,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The The Honorable, The Chief Justice And Associate Justices Of The Supreme Court of the United States:

The Petitioner, Harry R. Smith, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Eighth Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States District Court for the Southern District of Iowa, Central Division, was entered on June 27, 1963, and is not reported, but appears

in the original record filed with, and certified by, the Clerk of the United States Court of Appeals, as a part of this record, and transmitted heretofore.

The opinion of the United States Court of Appeals for the Eighth Circuit, affirming said judgment, was filed on the 28th day of April, 1964. That opinion is not yet reported, but is set forth in the Appendix hereto, and in the certified copy of the record.

JURISDICTION

The Order of the United States Court of Appeals for the Eighth Circuit, affirming the judgment of the United States District Court for the Southern District of Iowa, Central Division, was filed on the 28th day of April, 1964. On May 12, 1964, it was ordered that the Petition for Rehearing be denied. This Petition is filed within 30 days of the denial of the Petition for Rehearing in the United States Court of Appeals for the Eighth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where a Court's witness' testimony was, in substance, an admission that he pleaded guilty, where the other Government evidence against the Petitioner was entirely circumstantial, and where the Judge told the jury that the Court's witness was charged together with the Petitioner, are the adverse inferences arising from the witness' repeated invocation of the testimonial privilege cured by an admonition by the Court that the invocations are not to be given any weight?

2. Where the evidence showed an association between the Petitioner and his co-defendant (who was not on trial), and the co-defendant's testimony amounted to nothing more than admissions that he had pleaded guilty to the charge for which Petitioner was then on trial, has not Petitioner's right to be tried solely on the evidence against him, rather than the admission of another's guilt, been violated?

3. When a co-defendant, not on trial, called as a Court's witness, stands mute under cross examination by a defendant on trial, and his testimony given under examination by the prosecution is allowed to stand, will the Sixth Amendment tolerate conviction?

4. Is not the exercise of this Court's supervisory power required where conviction most probably rests on inferences from repeated invocations of the Fifth Amendment and the admission of a co-defendant's plea of guilty; where the constitutional right of cross examination is allowed to be frustrated; and where that Constitutional right is arbitrarily cut off?

STATEMENT OF THE CASE.

This Petitioner, Harry R. Smith, and one Frank Anthony Dalia were indicted by a Grand Jury in the Southern District of Iowa, charged with a violation of 18 U.S.C. Section 2113(a), in that on or about October 22, 1962, they, with the intent to commit a felony, to wit, larceny, entered the Altoona State Bank, Altoona, Iowa, the deposits of said bank being insured by the Federal Deposit Insurance Corporation.

Petitioner went to trial alone on the one count indictment, his named co-defendant, Dalia, having entered a plea theretofore under Rule 20 of the Federal Rules of Criminal Procedure. (App. 2)

The evidence established that sometime between 8 p.m. Sunday, October 21, 1962, and the early morning of October 22, 1962, a forceable entry was made into the Altoona State Bank and into a night depository safe located therein. Approximately $6,000, of which sixteen to eighteen hundred was in currency, was taken from the safe. (Tr. 44, 52, 183).[1]

Shortly after 1:15 a.m. on October 22, 1962, Iowa State Patrol Officer, Calvin White was proceeding in an easterly direction on Highway #90 from Altoona, Iowa to the Duffield farm, where he was to deliver some papers. In driving through Altoona he passed and noticed the Altoona State Bank, part of the new shopping center, located on the south side of Highway #90, but he proceeded on without stopping. (Tr. 60, 326). After completing his business at the Duffield farm and while he was headed back west

[1] All "Tr." references relate to the trial transcript.

toward Altoona on Highway #90, he noticed a car coming south on a gravel road which intersects with Highway #90. This car was a 1957, 1958, or 1959 DeSoto, dark color, and bore Illinois license plates. There was, and had been, no traffic between Duffield farm on Highway #90 and the gravel road on which DeSoto was traveling in a southerly direction. Officer White turned north on to the gravel road, pulled up directly opposite the DeSoto and directed the driver thereof to "hold it" or words to that effect. The driver of the DeSoto did not answer or comply with the request. He drove rapidly onto Highway #90 and turned east. Officer White backed onto the highway and began pursuit, following the other car at a distance of approximately 300 to 400 feet. The pursuit continued for about 5 miles, reaching speeds of 100 miles an hour.

At one point less than one half mile from the beginning of the chase, Officer White observed an object "moving" in the middle of his side of the road. He swerved north to avoid it. He had not seen it there when he drove west after completing his business at the Duffield farm. Shortly after swerving to avoid the moving object, he noted what appeared to be paper or something of that nature flying around in the air. After some distance both vehicles overtook and passed another car bearing an Ohio license. The chase ended with the DeSoto going out of control on a curve, traveling some 580 feet from the point it left the highway and ending overturned on its top. During the entire chase Officer White (except for an interval of a few seconds not pertinent here), had the DeSoto in his view, and at no time saw anything thrown or ejected from that car. The occupants of the DeSoto were identified as the Petitioner, Harry R. Smith, Paul Smith, his brother, who was killed in the accident, and Anthony Dalia, the named co-defendant not on trial. Petitioner and Dalia were badly injured. (Tr. 60-62, 87-99, 103, 105-108).

After they had been given first aid and efforts had been made to revive Paul Smith, Petitioner and Dalia were removed by ambulance to a hospital in Des Moines. Officer White then returned to the area where he had observed the object in the road, which turned out to be a Navy type sea bag containing a sledge hammer, pry bars and other tools. (Plaintiff's Exhibits 2, 5-9). Searches of the highway between 3½-6 hours after the accident resulted in finding currency, including a $100 bill, some 50's and smaller bills with an Altoona State Bank deposit slip attached by paper clip. There were also found several other Altoona State Bank night deposit envelopes containing checks and currency identified as having been deposited in the Altoona night depository safe during that portion of the weekend prior to the break-in. They were mainly found west of the Duffield farm but all within one and a half to two miles of the beginning of the route of the chase. (Tr. 77-78, 100, 104, 193, 203-209). In the opinion of expert witnesses, tools found in the green Navy type sea bag had been used on the doors of the Altoona State Bank and its safe, or from a safe painted and insulated in a similar manner. (Tr. 121-122, 138).

At the hospital Dalia was found to be wearing shoes, and no shoes were inventoried as part of Petitioner's clothing. (Tr. 232-3, 276, 228-230). The wrecked automobile was towed to Des Moines and about five and one half hours after the accident a pair of shoes was found in it. (Tr. 110-113). Soil samples taken from the ridge and striated soles of the shoes were similar to soil samples found in front of the Altoona State Bank safe door. (Tr. 150, 124-125, 130-132).

The above is the totality of the evidence introduced by the Government against this Petitioner, up to the time that Dalia (named co-defendant, not on trial) was brought into

Court to testify. The Court of Appeals for the Eighth Circuit recognized that all such evidence was, of course, circumstantial. (App. 27).

The Testimony of the Witness Dalia

It is about the appearance of the witness Dalia that this Petitioner centers his prayer that this Court grant Certiorari to review this cause. The bulk of that testimony is set forth in the opinion of the Court of Appeals for the Eighth Circuit as an extensive footnote. (App. 6-14).

The prosecutor requested "that Mr. Dalia be called as the Court's witness for the purpose of cross examination in view of the fact that he was named in this indictment." Objection was made by the defense because of the want of some basis or foundation. The Government then stated that it *felt* this witness had information bearing on the case, but that the government, in view of his implication, was not prepared to vouch for him. Thereupon, the request that Dalia be made a Court's witness was granted. (Tr. 234-236).

Under examination by the prosecutor, Mr. Dalia gave his name. To the next question "And Mr. Dalia have you also been known as Anthony Walters?", he invoked the Fifth Amendment. He was then asked "Whether or not you were charged in an indictment with entering the Altoona State Bank on October 22, 1962, the deposits of which were then and there insured in the Federal Deposit Insurance Corporation, with intent to commit a felony, to wit, a larceny, which the Grand Jury returned a charge against you?" Again Dalia invoked the Fifth Amendment, but the Court directed him to answer, and he answered in the affirmative. Then, in response to interrogation, he testified that he pleaded guilty to a case of bank

burglary at the Altoona State Bank in Altoona, Iowa, on October 22, 1962. The questioning proceeded and he answered that he had been involved in an accident in the early hours of October 22, 1962, in Iowa about five and one half miles east of Altoona. He was then asked who was in the car with him, and where he was in the early hours of October 21, 1962, to which questions he invoked the Fifth Amendment. He then stated, under the prosecutor's questioning, that he had lived in Chicago all his life. He invoked the Fifth Amendment to whether he was acquainted with the Petitioner in this cause; to whether he was acquainted with Mr. Paul Smith who was involved and killed in the accident; to how long he was in Iowa around the date of October 22, 1962; to whether he left Chicago with the here Petitioner; to how long he had been traveling on the road with the Petitioner. He stated under questioning that he was taken to Broadlawns General Hospital in Des Moines, Iowa, following the accident. He again invoked the Fifth Amendment to how long he was in Altoona, Iowa, on the evening of October 21, 1962, or the early morning of October 22, 1962; to how long the Petitioner was in Altoona on the evening of October 21st or the early morning hours of October 22nd; and, to whether he entered the front doors of the Altoona State Bank on that date. This concluded examination of Dalia by the Government. (Tr. 236-239).

Under examination by defense counsel he testified that he was now in the custody of the Attorney General of the United States under sentence in the United States District Court at Indianapolis, Indiana, serving a sentence based upon a plea to bank robbery in Indianapolis, which plea was entered on April 25. He testified he was transported to the Court from Indianapolis by the United States Marshall's Office and that he was presently confined in Polk

County Jail in the Federal section and that he received a 12 year sentence on the Indianapolis charge. He testified that the United States Attorney had not advised him of any rights, that he had no counsel for that purpose, that he desired counsel for that purpose, that he had gone to the 10th grade in school. (Tr. 240-241).

At that point, defense counsel addressed the court, indicating that he desired further cross-examination, but did not want to trample on the man's rights and that he felt that the witness should be advised. (Tr. 242).

The Court, then, out of the presence of the jury, proceeded to interrogate the witness. In response to such questioning Dalia stated that he would like to speak to an attorney before he answered any questions of the defendant but he had no funds to employ counsel. That he would like counsel in the way of protecting himself from any interrogatories posed by anyone, government or state. He stated that he had never had opportunity to communicate to the court that he desired counsel, but that he had indicated he desired counsel to the Marshal and that he did desire counsel before he proceeded further. (Tr. 242-243).

Whereupon the Court went into recess to take the matter under consideration.

On the following morning, Dalia appeared with counsel, one Frank Oliver, who had prepared and submitted to the Court a "motion for judgment of acquittal" in behalf of Dalia claiming, *inter alia*, improprieties and that "blandishment offered to him by the prosecution" induced him to enter his plea of guilty. That motion was taken under advisement, and thereupon counsel for this petitioner moved to strike the testimony of Dalia and for a mistrial. The motion for a mistrial was denied, but de-

cision on the motion to strike was reserved, and Dalia was directed by the Court to resume the witness stand over his protestation that his rights were being violated. (Tr. 245-272). Thereupon, this petitioner's counsel proceeded to continue his cross examination, which developed as follows:

"Q. Your name is Frank Anthony Dalia or Dalia?—

Mr. Lawler: I ask the Court to instruct the witness to answer.

The Court: The Court will not instruct the witness to answer because he has already answered that question.

Q. (By Mr. Lawyer) Mr. Dalia, state whether or not on the 22nd of October, 1962, you entered the Altoona State Bank, Altoona, Iowa?—

Mr. Lawyer: I request the Court to instruct the witness to answer.

The Court: The Court will not compel the witness to answer the interrogatory.

Q. (By Mr. Lawyer) Mr. Dalia, did you or did you not advise anyone on behalf of the prosecution or an official of this court that you would refuse to testify prior to coming to Court yesterday?—

Mr. Lawyer: I request the Court to instruct the witness to answer.

The Court: The Court will not require the witness to answer.

Q. (By Mr. Lawyer) Mr. Dalia, where do you live?—

Mr. Lawyer: I request the Court to instruct the witness to answer.

The Court: The witness, if not having already answered, is not required to answer further.

Q. (By Mr. Lawyer) Mr. Dalia, I ask you whether or not you have any information which would bear on the innocence of Harry Smith sitting here to the left of me two persons down, this man sitting right here?—

Mr. Lawyer: I request the Court to instruct the witness to answer.

The Court: The Court will not require the witness to answer.

Q. (By Mr. Lawyer) Mr. Dalia, you testified yesterday that you pleaded guilty to a charge of bank burglary in Indianapolis, Indiana, in connection with a bank in Indiana. State whether or not you received a concurrent sentence, identical to the sentence imposed in that case?

Mr. Lawyer: I request the Court to instruct the witness to answer.

The Court: If the witness hasn't already answered, he is not required to answer.

The examination of this witness is now concluded. The Court's witness has now concluded. You will now retire from the witness stand. The jury will retire to the jury room.

(Whereupon the witness, Mr. Dalia, leaves the courtroom with a Marshal and the jury retires to the jury room.)

The Court: Let the record show in this cause that the witness Dalia has taken the witness stand at the Court's request. That opportunity of cross examination has been afforded the defendant prior to this time and again at this time. That there has been in every aspect a constant injection into the record by counsel for the defendant of questions that have already and previously been asked and answered. That this Court is not about to tolerate any aggravation of any matters that may have occurred heretofore. That it is apparent to the Court, and the Court wants this a part of the record, that he wants this an orderly, carefully tried case in accordance with the interest of the defendant and of all parties concerned. That the administration of justice requires this statement in the record at this time, and defendant's counsel, and the defendant, is given due exception to the remarks of the Court. This has been made out of the presence of the jury. That will be all.

Call the jury back and proceed.

Mr. Lawyer: Your Honor, may I make a little further record, please?

Comes now the defendant and respectfully asks the Court to declare a mistrial for the reason the defendant has not been afforded an opportunity to cross examine the witness and has there been deprived under Article [*sic*] 6.

The Court: It's overruled. Call the jury.

Mr. Gross: Your Honor, at this time could we request that Dalia be returned to the courtroom for purposes of identification by another witness?

The Court: No, you may not." (Tr. 272-275).

The Motion to strike upon which ruling had been reserved, was subsequently denied. Relative to the testimony of Dalia, the jury was instructed as follows:

"INSTRUCTION NO. 3

"A Grand Jury for this District returned an Indictment against Harry R. Smith and Frank Anthony Dalia. During the course of the trial, testimony has been received concerning a plea of guilty as it relates to one of the witnesses, Frank Anthony Dalia. With respect to this matter, you are told that you will not consider the matter of a plea of guilty as evidence against the defendant in this cause. The fact of this plea in no way means or implies that the defendant herein on trial, Harry R. Smith, is guilty as charged. Any plea of Frank Anthony Dalia does not give rise to any inference as to the guilt of Harry R. Smith now on trial. The guilt or innocence of the defendant here on trial must be determined solely by the evidence introduced at the trial of this case. Likewise you will not speculate as to the significance of the plea of Frank Anthony Dalia nor will you give it any consideration in arriving at your verdict concerning the defendant in this case.

"You are further told that only Harry R. Smith is here on trial and the fact that the name of Frank Anthony Dalia appears as one of the co-defendants in the Indictment shall be given no significance.

"An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. If you find that the witness Frank Anthony Dalia is an accomplice, the credibility is for the jury to pass upon. However, such testimony should be received with caution and weighed and scrutinized with great care bearing in mind all portions of this instruction.

"INSTRUCTION NO. 4

"The witness Frank Anthony Dalia after having given some testimony made claim to the constitutional right against self-incrimination, which claim was sustained by the Court. The fact that said witness made said claim and that said claim was sustained by the Court is not to be given any weight or consideration by you arriving at your verdict." (App. 19-20)

As to the admission that Dalia had pleaded guilty, the Court of Appeals for the 8th Circuit found no prejudice because of the trial court's instructions set forth herein above. As to the invocation of the privilege against self-incrimination, the Court of Appeals for the 8th Circuit also considered any error obviated by the instructions. As to the refusal of Dalia to testify on cross examination by petitioner's counsel, the Court of Appeals for the Eighth Circuit, on this record,[2] found that Appellant's counsel invited the witness to claim his privilege with the result that after Dalia had arranged for counsel, he thereupon refused to take the witness stand and at no time thereafter did he answer any questions but remained mute. "Such building of a hedge in order to rely thereon as error is like knocking down a strawman which one has created for that very purpose and effect." (App. 21).

[2] The entire proceeding has been set forth here so that this Court might weigh the merit of the Court of Appeals opinion. It is apparent that all instances of invoking the testimonial privilege were prior to the "suggestion" of defense counsel that the witness be "advised", which suggestion was adopted by the trial court.

REASONS FOR GRANTING THE WRIT

This court should exercise its jurisdiction in this case for the following reasons:

I.

We interpret this Court's recent decision in *Namet* v. *United States*, 373 U.S. 179, as standing for the proposition that invocation of the 5th Amendment by a Government's witness is not necessarily prejudicial; that the circumstances may be such that the interest of justice is better served by allowing the invocation of the testimonial privilege in certain circumstances. We recognize that the circumstances will change from case to case, but the circumstances in *Namet* must, in the absence of a definitive rule, stand as a guide-post in consideration of whether the adverse inferences arising from repeated invocation of the testimonial privilege prejudice the defendant on trial. Those sign posts include the benefit of counsel. This Court also considered the jury was not told in the *Namet* case that the Kahns had been arrested or charged together with Namet. In the *Namet* case, the Kahns had theretofore given Government investigators information that supported the Government's case against Namet. This Court also found that non-privileged information to which the Kahns testified was used to corroborate the Government's case, and, in that sense, the testimonial privilege was tolerated that the benefit of the truth might be obtained. Further, the Kahn incident in the Namet trial constituted but minor lapses in a long trial. (This was but a three and one half day trial, including defense).

The Court will note that every articulated basis and reason for affirmance in the *Namet* case is conspicuously absent here. Nor do any like circumstances or even similar, analogous circumstances in this record justify the ac-

tion. There was no balance of benefit and detriment to be considered. The only thing that flowed from the repeated invocation of the testimonial privilege by Dalia was the almost inevitable inference that the answers, if given, would have incriminated this petitioner. We submit that this Court should grant Certiorari because the decision in this cause on this point is directly in conflict with this Court's decision in *Namet* and justice has not been aided, but done a disservice, by the procedure.

II.

In this case the evidence showed an association between the petitioner and his co-defendant, who was not on trial. This coupled with the co-defendant's testimony, given reluctantly and over his emphatic protest, that he had pleaded guilty to the charge for which petitioner was then on trial is recognized error. The decision of the Court of Appeals for the 8th Circuit on this point is in direct conflict with the following decisions with Courts of Appeals for other Circuits and of its own Circuit. Those decisions in conflict include:

Nigro v. *United States*, 8 Cir., 117 F. 2d 624.
Walker v. *United States*, 8 Cir., 93 F. 2d 383.
Leroy v. *Government of Canal Zone*, 5 Cir., 81 F. 2d 914.
Payton v. *United States*, C.A.D.C., 222 F. 2d 794.
Gaynor v. *United States*, C.A.D.C., 247 F. 2d 583.
United States v. *Toner*, 3 Cir., 173 F. 2d 140.
United States v. *Hall*, 2 Cir., 138 F. 2d 853.
Babb v. *United States*, 5 Cir., 218 F. 2d 538.

We submit further that the very recent case of *United States of America* v. *Lawrence Wilcher*, 7 Cir., No. 14381, May 20, 1964, not yet reported, is also in conflict with the decision of the Court of Appeals for the Eighth Circuit in this cause.

III.

It is our submission that when a co-defendant not on trial, called as a court's witness, stands mute under cross examination by defendant on trial and his testimony given under examination by the prosecutor is allowed to stand, there has been a very serious violation of the Sixth Amendment to the Constitution of the United States, a far departure from the accepted and usual course of judicial proceedings, calling for an exercise of this court's power of supervision. We submit that the failure to strike out the testimony of Dalia when Dalia refused to submit to cross examination by petitioner's counsel is in direct conflict with the rules set forth by the Sixth Circuit in *Stephan* v. *United States,* 133 F. 2d 97:

> "'The general rule is that 'where the witness after his examination-in-chief on the stand has refused to submit to cross examination, the opportunity of such probing and testing his statements as substantially failed and his direct testimony should be struck out.' Wigmore on Ev., *supra,* Section 1391, page 112, and cases cited in the footnote." (133 F. 2d at 97)

So unusual in the course of criminal law is the denial of cross examination that authorities on the point are practically non-existent. Turning however to Civil law, those cases stand universally for the proposition that all testimony on which cross examination is frustrated must be stricken. *Summit Drilling Corp.* v. *Commissioner of Internal Revenue,* 10 Cir., 160 F. 2d 703. We submit that the decision of the United States Court of Appeals for the Eighth Circuit is in direct conflict with the civil authorities. The accepted course of judicial proceedings would require an even higher standard in this criminal case, where the Sixth Amendment right to confrontation and its correlative right to cross examination applies.

IV.

This is a case where the petitioner was seriously prejudiced, probably convicted, by the government's introducing his co-defendant as a witness against him, especially where all other evidence was clearly, and admittedly, circumstantial.

The co-defendant's repeated invocation of the Fifth Amendment, in the absence of his giving any testimony that aided the seeking of truth, corroboration or explanation of the cause being tried, could only reflect upon the petitioner.

The co-defendant's compelled admission that he had pleaded guilty to the cause on trial, after it had been established that he was associated with the petitioner, and who testified to no facts in the aid of ascertaining the truth of the charge against the petitioner, could only have resulted in guilt by association.

The fact that the trial court told the jury that Dalia's invocation of the testimonial privilege was "not to be given any weight or consideration by you in arriving at your verdict" and that "you will not speculate as to the significance of the plea of Frank Anthony Dalia nor will you give it any consideration in arriving at your verdict" was itself too tepid to acquire significance. But, in the light of the other instructions of the Court, any force it might be thought to have was nullified and obliterated.

Telling the jury that petitioner and Dalia were co-defendants, he continued:

> "An accomplice is one who unites with another in the commission of a crime, voluntarily and with common intent. If you find that the witness Frank Anthony Dalia is an accomplice, the credibility is for the jury to pass on. However, such testimony should be received with caution and weighed and scrutinized with great care . . . "

It is obvious that any finding that Dalia was an accomplice, on this record, would depend on the association of the two, the invocation of the testimonial privilege, the charging of the two in the same indictment, the admission by Dalia he had pleaded guilty. No caution or scrutiny is appropriate to a man's admission he had pleaded guilty: It will be believed and accepted as complete truth.

All of this was magnified and enhanced by the toleration of a refusal to submit to cross examination on behalf of the petitioner (such a violation of the Sixth Amendment as not to require argument), and the cutting off of that cross examination.

"The examination of this witness is now concluded.

The Court's witness has now concluded."

This cutting-off was particularly harmful, where defense counsel was attempting to show that Dalia's plea of guilty brought a sentence concurrent with the sentence on another conviction — and that, as a practical matter, Dalia actually lost nothing by his plea.

We believe it would be next to impossible to find a case where such deviations from accepted standards of justice and procedural safeguard coincided in one cause. We submit that this Court's supervisory power is sorely needed, to prevent repetition of deviation from basic principles of fair trial, and to obviate any conception that such deviations will be tolerated now, or in the future.

CONCLUSION.

Wherefore, for the above and foregoing reasons, it is respectfully submitted that a writ of certiorari should issue.

Respectfully submitted,

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